

INDEX

JURISDICTION	Pages 2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2-3
ARGUMENT	3-11
1. The contempt proceedings pending before respondent circuit judge are proceedings for criminal contempt as distinguished from civil contempt	3-7
a. Distinction between criminal and civil contempt	4-6
b. Classification of contempt proceedings in question	6-7
2. Criminal contempt proceedings are separate and independent proceedings and hence the pending contempt proceedings are not within the scope of the petition for writ of prohibition	7-8
3. The determination of the issues in this case in favor of the petitioners would not preclude prosecution of the pending criminal contempt proceedings	8-11
CONCLUSION	11-12
APPENDIX	13-18

TABLE OF CITATIONS

CASES

	Pages
Ando v. Ando, 30 Haw. 80	4
Andrews v. Whitney, 21 Haw. 264	10
Bessette v. W. B. Conkey & Co., 194 U.S. 324	9
Carter v. United States, 135 F. (2d) 858	8, 10
Dole v. Gear, 14 Haw. 554	10
Dunham v. United States ex rel. Kansas City Southern Ry. Co., 289 Fed. 376	5
Fenton v. Walling, 139 F. (2d) 608	4
Forrest v. United States, 277 Fed. 873	5
Gompers v. Bucks Stove & Range Co., 221 U.S. 418....	4, 5, 8, 9
Howat v. Kansas, 258 U.S. 181	9
Lamb v. Cramer, 285 U.S. 217	4, 5
Maggio v. Zeitz, 333 U.S. 56	9
McCann v. New York Stock Exchange, 80 F. (2d) 211....	5
McCrone v. United States, 307 U.S. 61	4
Michaelson v. United States, 266 U.S. 42	4
Nye v. United States, 313 U.S. 33	4
Pahia, Ex parte, 13 Haw. 575	10
Parker v. United States, 153 F. (2d) 66	4
Penfield Co. v. Securities & Exchange Commission, 330 U.S. 585	4, 5
Rose v. Ashford, 22 Haw. 469	10
Sakan v. Ashford, 23 Haw. 267	10
Salvage Process Corp. v. Acme Tank Cleaning Process Corp., 86 F. (2d) 727	9
S. Anargyros v. Anargyros & Co., 191 Fed. 208	4, 9
Stewart v. United States, 236 Fed. 838	5
United States v. United Mine Workers, 330 U.S. 258	4, 5, 6, 8, 9, 10, 11
United States ex rel. West Virginia-Pittsburg Coal Co. v. Bittner, 11 F. (2d) 93	4
Worden v. Searls, 121 U.S. 14	9

STATUTES

28 U.S.C. § 1254(1)	2
---------------------------	---

OTHER REFERENCES

43 Colum. L. Rev. 780	6
-----------------------------	---

In the
Supreme Court of the United States
October Term, 1948

No. 510

INTERNATIONAL LONGSHOREMEN'S
AND WAREHOUSEMEN'S UNION
(CIO); LOCAL 144 OF THE INTERNA-
TIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO);
UNIT 1, LOCAL 144 OF THE INTERNA-
TIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO);
JOSEPH KAHOLOKULA, SEICHI DOI,
HARRIS YOSHIO NAGATA, BENJA-
MIN AWANA, FRANK MATSUI,
GEORGE FERNANDEZ, ERNEST FER-
NANDEZ, CHARLES REVERA, JOHN
DOE, MARY DOE, RICHARD DOE, et
al.,

Petitioners,

vs.

CABLE A. WIRTZ, as Judge of the Circuit
Court of the Second Judicial Circuit, Ter-
ritory of Hawaii, and MAUI AGRICUL-
TURAL COMPANY, LIMITED,

Respondents.

BRIEF OF RESPONDENT CABLE A. WIRTZ, JUDGE OF
THE CIRCUIT COURT OF THE SECOND CIRCUIT, TER-
RITORY OF HAWAII, IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decree of the United States Court of Appeals for the Ninth Circuit was entered September 27, 1948. (R. 113-114) Petition for rehearing, which was filed within the time allowed therefor by rule of court and an extension thereof, was denied November 16, 1948. (R. 114) The petition for writ of certiorari and brief in support thereof (hereinafter referred to as the petition) were filed January 13, 1949.

STATEMENT OF THE CASE

The statement of the case given in the petition, as qualified and corrected by the brief of respondent Maui Agricultural Company, Limited (hereinafter referred to as respondent company), is adopted for the purposes of this brief. However, it is deemed necessary to add that the contempt proceedings referred to in the petition (pp. 3, 5) are summary criminal contempt proceedings. Because the nature of the contempt proceedings is important in this case, as will be shown in the following argument, the information by which the proceedings were instituted is included in the appendix of this brief.

SUMMARY OF ARGUMENT

We are opposed to the granting of the petition. We believe the reasons stated in the petition for granting the writ are insufficient and that they are shown to be insubstantial by the brief of respondent company.

Concurring therein, we wish to adopt the argument in the brief of respondent company and to supplement it with a discussion of the contempt proceedings referred to in the preceding paragraph.

The following argument is directed to the ground stated in paragraph VI' of the petition (pp. 12-13) for granting the writ, which we construe as contending that the fact that petitioners stand charged for contempt for violating an allegedly void order issued by respondent circuit judge warrants review of the case by this Court. We propose to show (1) that the contempt proceedings in question are for criminal contempt as distinguished from civil contempt, (2) that the pending contempt proceedings are not within the scope of the petition for writ of prohibition which petitioners sought in the Supreme Court of Hawaii, and (3) that regardless of the outcome of this suit for prohibition, petitioners are liable and subject to be punished for criminal contempt. We conclude therefrom that the liability of petitioners for criminal contempt in the pending contempt proceedings does not justify the grant of certiorari.

ARGUMENT

1. *The contempt proceedings pending before respondent circuit judge are proceedings for criminal contempt as distinguished from civil contempt.*

"The reference in said paragraph to ". . . the refusal of the Supreme Court of the Territory to grant a writ of prohibition against proceedings for contempt . . ." is deemed erroneous and misleading for the reason that the contempt proceedings complained of by petitioners were not within the scope of the petition for writ of prohibition.

a. Distinction Between Criminal and Civil Contempt

It is generally recognized that there is a substantial distinction between criminal contempt and civil contempt, the fundamental difference being that in the latter the purpose of the proceedings is remedial and for the benefit of the complainant while in the former the purpose is punitive and to vindicate the authority of the court and the public interest. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441; *Michaelson v. United States*, 266 U. S. 42, 64; *Lamb v. Cramer*, 285 U. S. 217, 220; *McCrone v. United States*, 307 U. S. 61, 64; *Nye v. United States*, 313 U. S. 33, 42; *United States v. United Mine Workers*, 330 U. S. 258, 302; *Penfield Co. v. Securities & Exchange Commission*, 330 U. S. 585, 590; *Fenton v. Walling*, 139 F. (2d) 608, 609 (cert. den. 321 U. S. 798); *Ando v. Ando*, 30 Haw. 80, 87.

This basic difference in purpose is reflected in a difference in the form of the proceedings. Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause, while those for criminal contempt are between the public and the defendant and are not a part of the original suit but are separate and independent proceedings. *Gompers v. Bucks Stove & Range Co.*, *supra*, at 445; *Penfield Co. v. Securities & Exchange Commission*, *supra*, at 590; *Parker v. United States*, 153 F. (2d) 66, 70; *United States ex rel. West Virginia-Pittsburg Coal Co. v. Bittner*, 11 F. (2d) 93, 95; *S. Anargyros v. Anargyros & Co.*, 191 Fed. 208, 210. There are, however, variances from the rule, as in *United States v. United Mine Workers*, *supra*,

where it was held that both civil and criminal contempt could be tried in a single proceeding in the main cause. 330 U. S. at 299. Nevertheless, such matters as the identity of the person by whom the contempt proceedings are brought and the title of the contempt proceedings are generally significant. Proceedings brought by the government through its prosecuting officer are almost invariably held to be criminal contempt proceedings. *McCann v. New York Stock Exchange*, 80 F. (2d) 211, 214 (*cert. den.* 299 U. S. 603); *Dunham v. United States ex rel. Kansas City Southern Ry. Co.*, 289 Fed. 376, 379; *Forrest v. United States*, 277 Fed. 873, 876 (*cert. den.* 258 U. S. 629); *Stewart v. United States*, 236 Fed. 838, 842.

Since the classification of contempt proceedings as civil or criminal depends upon the purpose of the proceedings, the prayer for relief is regarded as particularly significant and has been held to be determinative. *Gompers v. Bucks Stove & Range Co.*, *supra*, at 448; *Lamb v. Cramer*, *supra*, at 220; *Penfield Co. v. Securities & Exchange Commission*, *supra*, at 590. In other cases the prayer has been treated as only one factor in classification. *Forrest v. United States*, *supra*, at 876.

Various other factors have been relied on in determining the nature of particular contempt proceedings. For example, in *United States v. United Mine Workers*, *supra*, the willfulness of the defendants' conduct and their policy of defiance were considered as supporting the conviction for criminal contempt. 330 U. S. at 303. An extensive discussion of this problem of classification with an analysis of the factors relied on by the courts is contained in an article on the subject *Con-*

tempt of Injunctions, Civil and Criminal, by Joseph Moskovitch, in 43 Colum. L. Rev. 780, cited in *United States v. United Mine Workers*, *supra*, 330 U. S. at 297. For the purposes of this brief, the foregoing discussion is deemed adequate to determine the proper classification of the contempt proceedings in question.

b. Classification of Contempt Proceedings in Question.

Proceeding, then, to a consideration of said contempt proceedings with a view to determining the classification, we have in the record a showing that they are summary contempt proceedings charging violations of the temporary restraining order issued in the equity suit which the petitioners sought to stay by the petition for writ of prohibition, that the alleged violations on which the proceedings are based were brought to the attention of the respondent circuit judge by affidavits and motion filed in the original equity suit, that thereupon the matter was referred to the county attorney and that subsequently summary contempt proceedings were instituted by the county attorney for such alleged violations. (R. 52-53; 93-99)

The record does not contain the information by which the contempt proceedings were instituted. Whatever may have been the actual reason for the exclusion, it was properly excluded for the reason that the proceedings in question are for criminal contempt and accordingly a separate and independent action. The information is printed as an appendix to this brief.

Said information was filed in equity as was the original suit, but given a new number, No. 327 (Appendix 13), the number of the original equity suit being No. 325 (R. 47; Appendix 15). The information further shows that the proceedings were entitled *In the Matter of the Contempt of Court of Benjamin Awana, et al.*,

and was brought in the name of the "TERRITORY OF HAWAII, by Wendell F. Crockett, Deputy County Attorney of the County of Maui" (Appendix 14), as distinguished from the main equity case, which was entitled *Maui Agricultural Company, Limited v. International Longshoremen's & Warehousemen's Union (CIO), et al* (R. 23). It further shows that the alleged violations were charged to be "in open and willful violation of said Restraining Order and in open and willful defiance and contempt of said Order and of [the] Court". (Appendix 16) Lastly, the information shows that the prayer was for a rule upon the defendants to show cause "why they should not be adjudged guilty of and punished for contempt of * * * Court". (Appendix 17)

It thus appears that a separate proceeding was brought in the name of the Territory by a duly authorized prosecuting officer charging a willful violation of the order of the court and praying for punishment for such contempt. On the basis of the authorities hereinabove cited, such facts clearly show, it is respectfully submitted, that the proceedings in question are criminal contempt proceedings.

2. Criminal contempt proceedings are separate and independent proceedings and hence the pending contempt proceedings are not within the scope of the petition for writ of prohibition.

On the basis of the rule cited on page 4 of this brief that criminal contempt proceedings are separate and independent proceedings as distinguished from civil contempt proceedings, which are part of the main cause, and the pleadings in the suit for writ of prohibition, it is submitted that the pending contempt proceedings are not in issue in this case.

The petition for writ of prohibition shows that the petitioners sought to stay further proceedings in a certain cause (R. 20), which, as the exhibits referred to in and attached to and made a part thereof show, is *Maui Agricultural Company, Limited v. International Longshoremen's & Warehousemen's Union (CIO), et al.* (R. 17, 23, 36, 39)¹ The petition for writ of prohibition does not in any way refer to the contempt proceedings, nor is the Territory of Hawaii, the plaintiff in the contempt proceedings, made a party thereto. It is therefore clear that the contempt proceedings are not within the scope of the petition for writ of prohibition.

3. *The determination of the issues in this case in favor of the petitioners would not preclude prosecution of the pending criminal contempt proceedings.*

A consequence of the rule that criminal contempt proceedings are separate and independent proceedings as distinguished from civil contempt proceedings, which are part of the main cause, is that criminal contempt proceedings may be prosecuted regardless of the outcome of the main cause while civil contempt proceedings stand or fall with the main cause. *Gompers v. Bucks Stove & Range Co., supra*, at 451; *United States v. United Mine Workers, supra*, at 294, 295; *Carter v. United States*, 135 F. (2d) 858, 860. Violations of an order are punishable as criminal contempt even though the order has been set aside on appeal

¹On pages 36 and 39 and elsewhere in the record, the bracketed references to the court and cause are in error, the proper reference being the Circuit Court of the Second Circuit, Territory of Hawaii, and not the Court of Appeals.

(*Worden v. Searls*, 121 U. S. 14, 27; *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 86 F. (2d) 727), or though the main cause has been mooted by a settlement between the parties (*Gompers v. Bucks Stove & Range Co.*, *supra*, at 451). On the other hand, a settlement of the main cause or the reversal of the order in the main cause bars relief for civil contempt. *Gompers v. Bucks Stove & Range Co.*, *supra*, at 451; *Worden v. Searls*, *supra*, at 26; *Bessette v. W. B. Conkey & Co.*, 194 U.S. 324, 329; *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, *supra*; *S. Anargyros v. Anargyros & Co.*, *supra*, at 209.

It is therefore a well-established rule that an order issued by a court within its jurisdiction, even though the order be erroneous, must be obeyed, on pain of criminal contempt, until it is reversed by orderly and proper proceedings. *Worden v. Searls*, *supra*, at 27; *Howat v. Kansas*, 258 U.S. 181, 189; *United States v. United Mine Workers*, *supra*, at 293. Once the order has become final, even in a civil contempt proceeding the legality of the order cannot be relitigated, nor can disobedience thereof be justified on the ground that the order should not have issued in the first place. *Maggio v. Zeitz*, 333 U. S. 56, 69. In the *United Mine Workers* case it was further established that even an order issued in excess of jurisdiction must be obeyed pending the determination of the question of the court's jurisdiction, at least where the jurisdictional question is a substantial and not merely a frivolous question, and consequently that persons violating such an order pending such determination are guilty of and subject to be punished for criminal contempt.

United States v. United Mine Workers, *supra*, at 294; *Carter v. United States*, *supra*, at 862.

The rule of the *United Mine Workers* case, which was adopted by a majority of this Court as an alternative ground of decision in that case, removes any possible justification for interference with the pending contempt proceedings. Its significance for the purposes of this case is that regardless of the status of the original suit in equity the criminal contempt proceeding may be prosecuted. Even if the relief prayed for by the petitioners in their suit for writ of prohibition, that is, dismissal of the original equity suit, should be granted by the courts or accomplished by the action of the petitioner in said suit, nevertheless petitioners would be liable and subject to be punished for criminal contempt. The application of the rule to the instant matter is quite apparent. Petitioners are charged with violating an outstanding order pending determination of a substantial question of the court's jurisdiction to issue such order.

The rule of the *United Mine Workers* case will be followed by the courts of the Territory, it is submitted. While the Supreme Court of Hawaii has held, as well as stated in its opinions, that an order issued in excess of jurisdiction is unenforceable in civil contempt proceedings (*Ex parte Pahia*, 13 Haw. 575; *Dole v. Gear*, 14 Haw. 554; *Andrews v. Whitney*, 21 Haw. 264; *Sakan v. Ashford*, 23 Haw. 267, 271), there is no decision contrary to the *United Mine Workers* rule. In the one case involving criminal contempt, *Rose v. Ashford*, 22 Haw. 469, a writ of prohibition staying the contempt proceedings was issued. The case involved a question of the validity of an order issued by the trial court which charged the respondent sheriff

for failing to execute promptly a warrant of arrest, making a false return of the warrant and failing to comply with a request of the court that he appear before the court to explain the delay in service and ordered him to appear on a day certain to show cause why he should not be adjudged in contempt. Citing the rule that in cases of constructive contempt, such as that alleged in the order, it is necessary, in order to give the court jurisdiction to proceed for contempt, that a formal statement of some sort, such as an affidavit, complaint or information, stating the facts be filed as the basis upon which attachment may issue (22 Haw. at 472), the Court held that the order was void and that the lower court was without jurisdiction to proceed in contempt for the reason that no such statement was filed. The case is clearly distinguishable from the *United Mine Workers* case and likewise the contempt proceedings now pending before respondent circuit judge, which were instituted by a formal information. It is, therefore, submitted that the decisions of the Supreme Court of Hawaii are not in conflict with the *United Mine Workers* decision, and that the rule of that case is applicable to the pending contempt proceedings.

CONCLUSION

We believe we have shown that the fact that petitioners stand charged in pending criminal contempt proceedings does not justify the granting of the petition. We further believe that the brief of respondent company, which we adopt, demonstrates the lack of merit in the other grounds alleged in the petition for the grant of certiorari. We, therefore, respectfully submit that the petition should be denied.

Dated: Honolulu, Territory of Hawaii, this 2d
day of February, 1949.

Respectfully submitted,

THOMAS W. FLYNN, Attorney for
Respondent Cable A. Wirtz, Judge
of the Circuit Court of the Second
Circuit, Territory of Hawaii

WALTER D. ACKERMAN, JR.
Attorney General of Hawaii

MICHIRO WATANABE
Deputy Attorney General
of Counsel

APPENDIX

IN THE

Circuit Court of the Second Circuit

TERRITORY OF HAWAII

AT CHAMBERS

IN EQUITY

327

In the Matter of the Contempt of
Court of: BENJAMIN AWANA, SEI-
CHI DOI, ERNEST FERNANDEZ,
GEORGE FERNANDEZ, FRANK
FRANCO, LIONEL HANAKAHI, KOI-
CHI ITO, BEN KAHAAWINUI, JO-
SEPH KAHOLOKULA, LIWAI KEA-
LOHA, HARRIS YOSHIO NAGATA,
RAFAEL PERRY, CHARLES REBERA,
HITOSHI SERA, AND TAKESHI
SHIMANO.

SUMMARY
CONTEMPT
PROCEEDINGS

INFORMATION

IN THE

Circuit Court of the Second Circuit

TERRITORY OF HAWAII

AT CHAMBERS

IN EQUITY
327

In the Matter of the Contempt of
Court of: BENJAMIN AWANA, SEI-
CHI DOI, ERNEST FERNANDEZ,
GEORGE FERNANDEZ, FRANK
FRANCO, LIONEL HANAKAHI, KOI-
CHI ITO, BEN KAHAAWINUI, JO-
SEPH KAHOLOKULA, LIWAI KEA-
LOHA, HARRIS YOSHIO NAGATA,
RAFAEL PERRY, CHARLES REBERA,
HITOSHI SERA, AND TAKESHI
SHIMANO.

SUMMARY
CONTEMPT
PROCEEDINGS

INFORMATION

And now comes the TERRITORY OF HAWAII, by Wen-
dell F. Crockett, Deputy County Attorney of the
County of Maui, and, complaining of the respondents
mentioned by name in paragraph 4 of this Informa-
tion, represents to the Court:

1. That at all times mentioned herein there was
and still is pending in this Court a certain equity pro-
ceeding for injunction entitled "MAUI AGRICULTURAL
COMPANY, LIMITED, PETITIONER, vs. INTERNATIONAL

LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), et al.", being Equity No. 325, wherein a Temporary Restraining Order was made and issued on October 17, 1946, which Restraining Order at all times mentioned herein was and is still in effect, a true copy of which said Order is attached hereto, marked Exhibit "A" and incorporated herein by reference.

2. That on the 17th day of October, 1946, said Temporary Restraining Order was duly served upon respondents Benjamin Awana, Seichi Doi, Ernest Fernandez, George Fernandez, Frank Franco, Lionel Hanakahi, Koichi Ito, Ben Kahaawinui, Joseph Kaholokula, Liwai Kealoha, Harris Yoshio Nagata, Rafael Perry, Charles Rebera, Hitoshi Sera and Takeshi Shimano, all being respondents mentioned in or covered by said Order.

3. That notice of said Temporary Restraining Order was further given generally to the entire Community in Paia, County of Maui, Territory of Hawaii, and elsewhere upon said Island of Maui, by publication of the fact of the issuance of said Order and of the substance of said Order in the late or afternoon editions on October 17, 1946, and in the October 18, 1946 editions of the Honolulu Advertiser and the Honolulu Star-Bulletin, both being newspapers printed and published in Honolulu, City and County of Honolulu, Territory of Hawaii, having a general circulation throughout said Territory, including said Island of Maui, all of which said newspaper editions are usually and were actually delivered and distributed on said Island of Maui on the date of issue thereof, and also by radio announcements on the afternoon and evening

of October 17 and the morning of October 18, 1946, over radio stations serving and customarily heard by the inhabitants of said Island.

4. That, notwithstanding that the persons hereinafter named as alleged violators of said Order had due notice of said Order and the contents thereof, as hereinabove set forth, a large number of persons, being members of International Longshoremen's and Warehousemen's Union (CIO), and some of them being members of Local 144 of the International Longshoremen's and Warehousemen's Union (CIO), and some of them being members of Unit 1, Local 144, International Longshoremen's and Warehousemen's Union, and of other persons acting in concert with them, in excess of one hundred ninety-four persons, and including, the following named persons:

Benjamin Awana	Joseph Kaholokula
Seichi Doi	Liwai Kealoha
Ernest Fernandez	Harris Yoshio Nagata
George Fernandez	Rafael Perry
Frank Franco	Charles Rebera
Lionel Hanakahi	Hitoshi Sera
Koichi Ito	Takeshi Shimano
Ben Kahaawinui	

and many others whose names are at present unknown to said Deputy County Attorney, on the morning of October 18, 1946, under the fraudulent pretense and guise of holding an alleged parade, in open and willful violation of said Restraining Order and in open and willful defiance and contempt of said Order and of this Court, did engage in mass picketing in numbers

in excess of one hundred ninety-four persons, and did congregate in crowds, on and near the premises of said Maui Agricultural Company, Limited, petitioner in said injunction proceeding (Equity No. 325 aforesaid), at said Paia, with intent to, and did then and there, interfere with the ingress to and egress from said Petitioner's mill, and other plantation buildings located at said Paia by said Petitioner, its employees and others who might desire entrance to said premises for the purpose of performing work and for other occasion, and did then and there threaten violence and use coercion and intimidation by force of numbers and otherwise by unlawful means upon said Petitioner's employees and others lawfully attempting to enter upon and proceed to and from said Petitioner's said premises.

WHEREOF, the said Deputy County Attorney, for and on behalf of the said Territory, moves this Court for a rule upon the defendants

Benjamin Awana	Joseph Kaholokula
Seichi Doi	Liwai Kealoha
Ernest Fernandez	Harris Yoshio Nagata
George Fernandez	Rafael Perry
Frank Franco	Charles Rebera
Lionel Hanakahi	Hitoshi Sera
Koichi Ito	Takeshi Shimano
Ben Kahaawinui	

to be and appear before this court, on a day to be named, and show cause, if any they or any of them have, why they should not be adjudged guilty of and punished for contempt of this Court in respect of each

and all of the aforesaid contemptuous acts.

DATED: Wailuku, Maui, T. H., this 7th day of November, 1946.

(Sgd.) **WENDELL F. CROCKETT**
Deputy County Attorney of the
County of Maui

[*Note:* The exhibit referred to in paragraph 1 of the foregoing Information has been omitted. It is included in the Record at pages 36-39 and 39-42.]